

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-2141

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
NICHOLAS MYSHOLOWSKY,

Petitioner-Appellant,

-against-

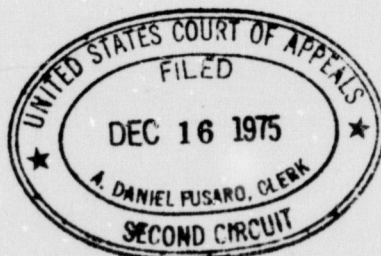
PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellee.

Docket No. 75-2141

APPENDIX TO THE BRIEF
FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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PLAINTIFFS						DEFENDANTS					

MYSHOLOWSKY, NICHOLAS
NICHOLAS MYSHOLOWSKY

THE PEOPLE OF THE STATE OF
NEW YORK

HABEAS CORPUS

CAUSE

28 U.S.C. 2242

(Related Cases 74-C-1594; 73-C-436;
72-C-1598)

ATTORNEYS -

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U.S.A. ex rel. NICHOLAS MYSHOLOWSKY vs. PEOPLE S

DATE	NR.	PROCEEDINGS
5-2-75		CAUSE ON TRANSFER FILED (from U.S. District Court, Scranton, Pa.,) Middle District of Pennsylvania) The following papers were received and filed: PETITION; MOTION for appointment of counsel; LETTER Clerk; PETITION for Writ of Habeas Corpus (forms) NOTICE from Wa ORDER re conviction in the State of N.Y., for first degree robbery etc. , and for transfer of proceeding to E.D.N.Y., etc., Letter of Clerk of Middle District of Pa., dated April 29, 1975; Certified copy of Docket Entries (Scranton, Pa.) Receipt endorsed upon the copy of letter of that Court and mailed on this day, re documents received. <i>W/1:7</i>
5-19-75		BY COSTANTINO, J. ORDER TO SHOW CAUSE FILED (1) The Atty., Gen., State of N.Y., to show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued, etc.
5-19-75		Copy of letter of Clerk of Court filed dated May 19, 1975 re enclosure of a copy of order, etc.
6-6-75		AFFIDAVIT OF BURTON HERMAN, ESQ., Assistant Atty., Gen., State of New York filed in opposition, etc.
6-12-75		REPLY AFFIDAVIT OF NICHOLAS MYSHOLOWSKY, filed.
6-17-75		BY COSTANTINO, J. MEMORANDUM and ORDER FILED. PETITION for a Writ of Habeas Corpus is DENIED. SO ORDERED. (See Memo., etc., dated 6-
6-18-75	16	JUDGMENT FILED. ORDERED and ADJUDGED that the petitioner take Nothing of the defendant and that the petition is DISMISSED.
6-24-75		NOTICE OF APPEAL FILED. - From order filed on 6-17-75 and dated 6-
6/30/75		Index on Appeal certified and mailed to the C. of A. -Duplicate of Index, file and Copy of Docket Entries.
7/3/75		Acknowledgment received from court of appeals for receipt of record
7-28-75		Petitioner's request for a certificate of probable cause filed.
7-31-75		By COSTANTINO, J.--MEMORANDUM AND ORDER FILED denying petitioner's application for certificate of probable cause.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUN 17 1975

NICHOLAS MYSHOLOWSKY

TIME A.M.
P.M. 75-C-662

v.

: MEMORANDUM and ORDER

THE PEOPLE OF THE STATE OF
NEW YORK

JUN 12 1975

Nicholas Mysholowsky, pro se

COSTANTINO, D.J.

On May 2, 1975 this court received the
petitioner's application for a writ of habeas corpus.
Petitioner asserts that his 1954 conviction for robbery in
the first degree, grand larceny in the first degree, and
two counts of assault in the second degree, should be
invalidated because of the suggestive nature of the pretrial
identification procedure. An order to show cause was signed
on May 14, 1975 and on June 6, 1975 the Attorney General of
the State of New York submitted his affidavit in opposition
along with the Record and Briefs of petitioner's 1954
conviction and appeal.

This court has examined the record of that

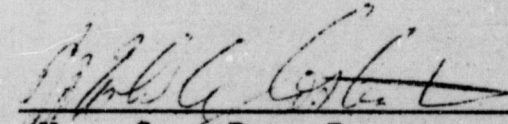
trial with specific attention paid to the testimony regarding the identification procedures. It notes that the identifying witnesses had a clear opportunity to see their assailants, and the pretrial inability to identify the pictures of the defendants was attributable to the age of the pictures shown to them. The correctness of the identification was a question for the jury who resolved it against both defendants. The procedures used were not so impermissibly suggestive as to warrant a finding of a constitutional violation. Indeed, it appears that there was nothing incorrect in the police procedures used.

Petitioner's claim that counsel was denied at the identification procedure is insubstantial in that that right was extended in Stovall v. Denno, 388 U.S. 293 (1967) and was not retroactive.

Petitioner's other claims have been considered and are denied.

The petition for a writ of habeas corpus is denied.

So Ordered.


U. S. D. J.

CERTIFICATE OF SERVICE

December 16, 1975

I certify that a copy of this brief and appendix
has been mailed to the Attorney General of the State
of New York.

Shirley Gustafson